IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL NO. 2724 16-MD-2724
THIS DOCUMENT RELATES TO: ***All End-Payer Plaintiffs' Actions***	HON. CYNTHIA M. RUFE

END-PAYER PLAINTIFFS' RENEWED MOTION
FOR ENTRY OF SET-ASIDE ORDER

For the reasons set forth in the accompanying Memorandum of Law, Class Counsel for End-Payer Plaintiffs hereby move the Court for entry of the proposed Set-Aside Order submitted in connection with this Motion. The factual and legal bases for the Motion are set forth in the attached Memorandum of Law, and are incorporated herein by reference.

Dated: May 22, 2025

Respectfully submitted,

/s/ Roberta D. Liebenberg

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END-PAYER PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF RENEWED MOTION FOR ENTRY OF SET-ASIDE ORDER

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I. INTRODUCTION

Counsel for End-Payer Plaintiffs ("EPP Class Counsel" or "Counsel") respectfully request that the Court enter a set-aside order that will create a fund allowing them to seek fair compensation from the resolution of claims by end payers who opt out of the EPP classes (collectively, "Opt-Out Plaintiffs") and settle claims arising out of the conduct at issue in this MDL.

As this Court has recognized, a framework establishing common benefit compensation is appropriate where "major entities await[] the development of the case by designated counsel and only file[] suit on the eve of the conclusion of discovery." Order of October 7, 2019 at 2 n.3 (MDL Doc. 1131) ("2019 Order") (quotation marks and citation omitted). The posture of this case now makes it ripe for a set-aside order. The MDL is nearly nine years old; fact and expert discovery in the bellwether cases is finished; *Daubert* motions have been fully litigated and decided; class certification has been granted; summary judgment has been fully briefed and argued; and EPP Class Counsel are preparing the bellwether cases for trials that are less than three months away.

In addition, EPP Class Counsel have reached settlements totaling $333 million. These settlements will benefit not only the class members who participate in the settlements, but also those who opt out, because these settlements will serve as a benchmark in any Opt-Out Plaintiffs' settlement negotiations. These settlements were only possible because of the leadership of Court-appointed EPP Counsel and their many years of unwavering efforts and arduous work, resulting in numerous favorable rulings that benefit all Plaintiffs.

As the Court is aware, the Plaintiffs' cases in this MDL are significant, unusually strong, and well publicized. They are also highly complex, work-intensive, and expensive to litigate. A set-aside order is necessary to avoid the inequities that would result where absent EPP class

members – having sat on the sidelines for many years and accepted the valuable benefits of EPP Class Counsel's extensive efforts to prosecute their claims – opt out of the litigation and/or the class settlements and then resolve their claims outside the class without compensating EPP Class Counsel.

Accordingly, EPP Class Counsel request an Order requiring any Defendant settling with an Opt-Out Plaintiff to set aside 12.5% of the settlement in an escrow account.[1] Later, EPP Class Counsel will apply to the Court for common benefit compensation from the set-aside funds. No money would be disbursed from the escrow account without Court approval.

The requested set-aside of 12.5% is reasonable in light of the substantial efforts EPP Class Counsel have made to advance these cases for all end payers, culminating in two upcoming trials and significant class settlements, the magnitude of which undoubtably will create benchmarks for Opt-Out Plaintiffs when negotiating settlements with Defendants. In addition, in the nearly nine years this litigation has proceeded, EPP Class Counsel have spent hundreds of thousands of hours on common-benefit efforts and obtained numerous favorable rulings that will benefit both class members and Opt-Out Plaintiffs.

II. FACTUAL BACKGROUND

A. The 2019 Set-Aside Motion

In April 2019, EPP Class Counsel—together with Direct Purchaser Plaintiff ("DPP") class counsel—filed a motion requesting that 10% of any recovery obtained by putative class members who opted out and pursued their own claims be placed in escrow, allowing counsel to

[1] The proposed set-aside order excludes the following end payers, which have been litigating this case themselves for many years: (1) United Healthcare Services, Inc. (since 2019); (2) Humana Inc. (since 2018); (3) Cigna Corp. (since 2020); (4) Health Care Services Corp. (since 2019); (5) Molina Healthcare, Inc. (since 2019); and (6) the local governmental entities included in the cases known as the "New York Counties" (since 2019, 2020, and 2021).

petition the Court for compensation for work benefiting those exiting plaintiffs. *See* Mem. of Law in Supp. of Mot. for Entry of Set-Aside Orders at 1-3 (MDL Doc. 955). The motion identified common benefit work EPP and DPP class counsel had performed in the three years since the MDL's creation, which included: originating cases for roughly half the drugs at issue; defeating motions to dismiss; propounding discovery requests; negotiating and litigating discovery-related motions and stipulations; and gaining access to millions of documents. *Id.* at 1-9. EPP and DPP class counsel argued that the favorable results they had secured "w[ould] benefit all plaintiffs, whether they remain in the classes or not." *Id.* at 9.

Direct Action Plaintiffs ("DAPs") United Healthcare Services, Inc. and Humana Inc. opposed the motion. *See* United & Humana Opp'n (MDL Doc. 1001); EPP & DPP Reply (MDL Doc. 1015); United & Humana Sur-Reply (MDL Doc. 1026).[2] They argued, *inter alia*, that the litigation was not sufficiently advanced to justify a set-aside framework, including because "full non-stayed merits discovery ha[d] not begun." United & Humana Opp'n at 12. United and Humana also highlighted that they had "agreed to contribute to cost-sharing arrangements" and intended to "help[] perform the tremendous amount of work yet to be done in this case." *Id.*

On October 7, 2019, the Court denied the motion without prejudice, identifying three principal concerns. ***First***, "[b]ecause no classes ha[d] yet been certified and the scope of the parties that would be affected by the orders ha[d] not been established," the Court explained that "the traditional mechanisms of class actions may appropriately compensate any class counsel." 2019 Order at 2. ***Second***, the Court expressed concern that counsel's proposal could create significant administrative burdens. *Id.* ***Third***, the Court explained that, in the context of this

[2] The Kroger DAPs also opposed the motion as to the DPPs only. *See* Kroger Opp'n (MDL Doc. 1000); DPP Reply (MDL Doc. 1016); Kroger Sur-Reply (MDL Doc. 1029).

MDL, counsel could "monitor[] whether individual settlements of antitrust claims have been reached with the mostly publicly-traded corporate Defendants." *Id.* The Court emphasized that its denial of the motion "d[id] not foreclose the possibility that the proposed mechanism or a similar one may be appropriate at some later stage to ensure fair compensation." *Id.*

As detailed below, significant events have transpired during the past five-plus years that warrant entry of a set-aside order at this time. Moreover, EPPs' renewed motion addresses the Court's prior concerns. *See* § III.B., *infra*.

B. EPP Class Counsel's Common Benefit Work

Since this MDL began in March 2016, EPP Class Counsel have taken the laboring oar in pursuing this litigation and implementing an effective litigation strategy against dozens of major drug manufacturers who are represented by some of the country's largest and most experienced law firms. Uniquely among counsel for private plaintiffs, EPP Class Counsel took the lead or played a principal role in *every* significant aspect of this MDL.

This MDL began in March 2016, when EPPs filed **antitrust complaints** concerning digoxin and doxycycline, and the Judicial Panel for Multidistrict Litigation ("JPML") created MDL 2724. Thereafter, EPP Class Counsel filed 16 cases concerning 16 additional drugs, and the JPML transferred those cases to this Court and expanded the scope of MDL 2724, renaming it *In re Generic Pharmaceuticals Pricing Antitrust Litigation*. *See* 222 F. Supp. 3d 1341 (J.P.M.L. 2017). Later, in June 2018 and December 2019, EPPs filed two complaints alleging an overarching conspiracy in the pharmaceutical industry and addressing additional drugs and Defendants, some of which the State Attorneys General ("States") did not include in any of their complaints.[3]

[3] A recurring MDL myth is that the States alone first brought Defendants' widespread wrongdoing to light. Not so. Only one of EPPs' initial cases (glyburide) was a follow-on to a

From the start, EPPs took a leading role in organizing and driving this massive MDL. EPPs have taken the lead for Plaintiffs on common issues at virtually every general and leadership status conference with the Court. One of the first issues confronting the Court was how to manage **motions to dismiss** when dozens of complaints had been filed in the MDL. EPPs negotiated and litigated a sequenced schedule under which Defendants would first move to dismiss certain class action complaints with respect to six drugs, and thereafter they could move to dismiss additional complaints at later dates. MDL Doc. 388. Defendants filed their motions to dismiss EPPs' complaints with respect to those six drugs, which EPPs opposed, and the Court denied Defendants' motions almost in their entirety in opinions dated October 16, 2018 (MDL Doc. 722) and February 15, 2019 (MDL Doc. 857). Later, EPPs defeated a second round of motions to dismiss and to strike certain allegations filed by several Defendants regarding EPPs' state law claims (*see* Mem. Op. of May 10, 2022, MDL Doc. 2084), providing another favorable precedent on which members of the class, as well as Opt-Out Plaintiffs, can rely—indeed, on which they have actually relied. *See* n.4, *infra*.

While the first set of motions to dismiss were pending, Defendants and the U.S. Department of Justice ("DOJ") sought to stay discovery until after resolution of all pending and forthcoming motions to dismiss. MDL Docs. 426, 492, 516. EPPs took the lead on behalf of all Plaintiffs in opposing the **motions to stay** and cross-moving for **permission to conduct certain discovery**. MDL Docs. 523, 524. On February 9, 2018, the Court denied the motions to stay, granted Plaintiffs' cross-motion for targeted discovery, and authorized certain discovery to

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case filed by the States. *The other seventeen single-drug cases – including the Clobetasol and Clomipramine bellwether cases – originated with EPPs and/or DPPs. EPPs also named* ***all*** *of the largest and most central Defendants, including Mylan, Sandoz, Taro and Teva, before the States did.*

proceed immediately. *See* PTO 44, MDL Doc. 560. Later, as DOJ asked for extensions of the partial discovery stay, EPPs continued to take the lead in negotiating with DOJ to craft proposed pretrial orders lifting the partial stay of discovery as it applied to employee documents. PTOs 60, 73; MDL Docs. 774, 853. These negotiations allowed EPPs to continue to develop the case even while DOJ's investigation was proceeding. In the years thereafter, EPPs negotiated with DOJ regarding serial renewals (and the narrowing) of the limited stay of discovery (*see* PTOs 47, 60, 73, 96, 117, 126, 136, 147, 156, 166, 173, 174, 181, and 200), took a leading role in briefing to the Court concerning disputes related to that stay, and in June 2024 negotiated the final termination of the stay for Private Plaintiffs (*see* PTO 276).

EPP Class Counsel expended considerable time and effort in negotiating and litigating all of the primary **discovery-related protocols and stipulations** in the MDL. Some of the most important early contested issues related to Defendants' arguments that discovery should proceed on a drug-specific basis and Defendants' attempts to silo discovery by limiting the use of documents to the individual drug-specific cases in which they were produced. EPPs spearheaded the oppositions to Defendants' efforts. MDL Doc. 517 at 8-10; MDL Doc. 518. The Court rejected Defendants' arguments and allowed material produced during discovery to be used in "any part of this MDL," PTO 45, MDL Doc. 561 at 11, which was an important victory for all Plaintiffs.

EPPs also negotiated the protocol that enabled all Private Plaintiffs to **gain access to documents that the States had gathered** as part of their non-public investigation into the generic pharmaceuticals industry. After the Court ordered that Plaintiffs should have access to those materials (*see* Order of 11/14/2018, MDL Doc. 758), EPPs took the lead in extensive negotiations with Defendants and the States, with the assistance of the Special Master, to develop

a plan for implementing the Court's Order and obtaining these important documents. On January 31, 2019, the Court adopted the plan as PTO 70, known as the "AG Access Protocol." MDL Doc. 841. Later, EPPs negotiated modifications to that Protocol to account for the subsequent filing of the States' "Teva-centric" complaint, thus ensuring all Private Plaintiffs gained access to a broader universe of the documents collected by the States during their non-public investigation. *See* PTO 106.

EPPs engaged in lengthy and extensive negotiations to develop other protocols in the case, as well. They were the lead negotiators on the initial **Protective Order**, PTO 45, and the detailed protocol for the production of electronically stored information, the **"ESI Protocol,"** PTO 95, MDL Doc. 1045. Although agreement was reached on many issues, there were several discrete but significant disputes that EPPs briefed, including whether Defendants would be allowed to redact documents for relevance, rather than only for privilege, and technical issues relating to "email thread suppression" and other metadata production issues. *See* MDL Docs. 584, 585, 587, 588, 602. EPPs presented argument on these issues at the July 11, 2018, hearing, MDL Doc. 649, submitted supplemental briefs, MDL Doc. 879, and presented oral argument in front of the ESI Special Master. On April 10, 2019, the Court ruled in Plaintiffs' favor on the redaction dispute, prohibiting Defendants from redacting documents on grounds of relevance. *See* Order of 4/10/2019, MDL Doc. 938. This important victory permitted all Plaintiffs to review and use full, rather than sanitized, versions of Defendants' documents.

As the case developed, EPPs also led the successful effort to **modify the protective order** to allow greater flexibility during depositions of Defendants' witnesses, by allowing examination of Defendants' employees using documents produced by other Defendants with whom the witness is alleged to have conspired. Defendants opposed those efforts, but after

extensive negotiations and litigation before the Special Master (*see* Special Master Marion's 9th R&R, MDL Doc. 1958), the Court implemented the relief EPPs sought on behalf of all plaintiffs when it entered PTO 195 (*see* ¶¶ 5.3j & 5.3.l).

EPPs also took the lead in drafting and negotiating a protocol for proceedings among the parties and the Special Masters to address **discovery disputes**, which this Court entered as PTO 68 (1/4/2019 Special Masters' Protocol), MDL Doc. 823. Later, EPPs led the effort to obtain a modification of the Special Master Protocol to provide for expedited mediation of disputes (*see* PTO 163 ¶ 6), making dispute resolution more efficient and flexible.

After obtaining the Court's permission to proceed with certain discovery under PTO 44, in 2018 EPPs promptly **served nearly 100 requests for production** of documents and interrogatories on each of the 30-plus Defendants. Thereafter, EPPs engaged in dozens of time-consuming negotiations with Defendants, on both individual and global issues. While the parties were able to resolve many issues through extensive meet-and-confers, they reached impasse with respect to certain global issues, primarily the definitions of "Relevant Time Period," "Drugs at Issue," "Defendants" and "Competitors," which were critical to defining the scope of discovery and required comprehensive briefing. MDL Docs. 714, 756, 761, 762, 764-71. EPPs took the lead in arguing these issues before the Special Discovery Master on December 18, 2018. On January 8, 2019, the Special Discovery Master issued a recommended resolution of these disputed definitions, which all parties except two Defendants accepted. EPPs took the lead in further meetings and negotiations with those two Defendants and the Special Discovery Master and ultimately achieved favorable resolutions. *See* PTO 82. With the States, EPPs negotiated the search terms to be applied to Defendants' custodial documents and litigated the related disputes before the Special Master for ESI.

On a separate track from the negotiations over global discovery issues, EPPs spent many months negotiating with individual Defendants concerning all manner of **document production issues**: selection of custodians and search terms, search methodologies, how to manage collection and production of documents without a relevance review under PTO 105 (subject to a clawback right), production of "go get" documents, and establishment of production deadlines. EPP Class Counsel took the lead on behalf of dozens of Plaintiffs' lawyers in engaging individual Defendants in hundreds of meet-and-confers. These discussions often required the input of technical experts. To that end, EPPs hired a vendor on behalf of all Plaintiffs to provide e-discovery expertise and assistance in meet-and-confers with Defendants on issues such as how to search Defendants' collection of text messages using mobile phone numbers as search terms. EPPs also conducted related legal research on a range of issues such as privacy law, e-discovery, and preservation obligations.

After the scope of the MDL expanded in 2019 with the filing of additional complaints, EPPs drafted, served and led negotiations concerning all Plaintiffs' **second set of document requests and second set of interrogatories**, which sought documents and information from the Defendants that were added to the MDL in 2019, and expanded the relevant time period for already existing Defendants as part of "Phase 2" discovery. *See* PTO 153.

When the parties' discussions reached impasse, EPPs took the lead in drafting letter-briefs and arguing **issues before the Special Masters**, including:

- the adequacy of Mylan's interrogatory responses regarding employees' personal cell phones;
- Mylan's production of calendars and contact files;
- disputed Impax document custodians;

- whether Sandoz's former Presidents and CEOs should be document custodians;
- whether Lupin and Lannett's executive assistants should be document custodians;
- assertions of Fifth Amendment privileges by certain former employees in response to document subpoenas;
- Defendant-specific search term disputes involving Mylan and Sandoz;
- the temporal scope of Defendants' transaction data productions;
- former Actavis employee Michael Perfetto's motion for a protective order seeking to stay his deposition pending the outcome of the criminal trial of Ara Aprahamian;
- Mylan's objections to Plaintiffs' 30(b)(6) notice;
- reopening the Taro 30(b)(6) deposition due to improper assertions of privilege;
- securing transaction data from Caremark, one of the nation's largest pharmacy benefit managers;
- whether Defendants should be allowed to obtain discovery about how third-party-payers fund their health plans; and
- whether Taro should be allowed to withdraw its answers to requests for admissions, in which it admitted to participating in the conspiracies described in its deferred prosecution agreement with the U.S. Department of Justice.

Many of these disputes established favorable precedents that governed related disputes with other Defendants and thus avoided duplicative litigation. For example, the resolution of the Caremark dispute cleared a significant hurdle relating to EPPs' collection of unprecedented amounts of transaction data from eight pharmacy benefit managers detailing end-payer transactions. Similarly, after Defendants recently moved to compel DAP insurers Humana, HCSC and Molina to produce documents relating to those insurers' premium-setting processes

and the "spread pricing" practices of Pharmacy Benefit Managers, in opposing that motion the DAP insurers relied on two victories secured by EPPs on the same issues. *See* MDL Doc. 3226 (Order overruling defense objections to the Special Master's Sixteenth R&R); *In re Generic Pharms. Pricing Antitrust Litig*., No. 16-CB-27242, 2024 WL 4980784, at *17 (E.D. Pa. Dec. 3, 2024), *on reconsideration in part*, 2025 WL 478178, at *3 (E.D. Pa. Feb. 12, 2025) (addressing spread pricing issues).

On yet another track, EPPs served several hundred **subpoenas on non-parties**. On behalf of all Private Plaintiffs, EPPs led the effort to secure phone records of Defendants' employees via subpoena to telephone carriers. In April 2018, Defendants moved to quash one of those subpoenas. MDL Doc. 601. EPPs opposed the motion and presented oral argument at the July 11, 2018, hearing, and the Court denied the motion. MDL Docs. 634, 758. In January 2019, more than a dozen Defendants launched another round of objections seeking to quash telephone-carrier subpoenas. For all of them, EPPs took the lead in briefing and oral argument before the Special Discovery Master, and in resolving many of these and other related disputes. EPPs' efforts resulted in the production of several million phone records, which are central evidence of Defendants' conspiracy. EPPs also negotiated with phone carriers to obtain declarations to authenticate the phone records.

Relatedly, EPPs negotiated the **protective order governing production and use of phone records** in the MDL (PTO 94), as well as a supplemental protective order allowing disclosure of Defendants' employees' phone numbers to subpoena recipients (PTO 182). These protective orders facilitated Plaintiffs' ability to utilize phone records to conduct further discovery and prove the existence of inter-Defendant communications. On all aspects of phone record evidence – litigating, securing and authenticating – EPPs alone led the way for Private

Plaintiffs.

With many Defendants claiming a lack of possession, custody or control over key discovery materials, including employees' cell phones, EPPs sought those materials directly from Defendants' current and former employees. EPPs **drafted and served dozens of subpoenas** on those individuals, and along with other Plaintiffs' counsel, conducted extensive meet-and-confers. That, too, resulted in the production of evidence that advanced the case.

These discovery-related efforts ultimately led to the production of tens of millions of documents and a massive amount of transaction data that all Plaintiffs are using to prove their claims. EPPs devoted dozens of attorneys to **reviewing the document discovery record**, a crucial undertaking that unearthed emails and other documents that were the centerpiece of Plaintiffs' deposition program and serve as crucial pieces of the conspiracy puzzle. In addition, EPPs led negotiations with certain Defendants to secure **stipulations** on behalf of all Plaintiffs that certify the authenticity of Defendants' documents, and for recalcitrant Defendants who refused to stipulate on this straightforward issue, EPPs issued hundreds of **requests for admission**.

EPPs also led efforts to facilitate the timely production of documents. On behalf of all Plaintiffs, EPPs raised concerns with the Special Masters about the lack of progress in Defendants' document productions, which led to a **regular reporting process** and accountability. Similarly, with respect to third-party discovery, EPPs led the effort to develop a reporting regime to track production of transaction data and documents by third parties, resulting in the regular submission of a tracking report to the Special Masters, providing greater transparency and accountability.

EPPs played a leading role in all aspects of **deposition planning and strategy**. First, EPPs led the negotiations with Defendants over the protocol for conducting fact depositions in this massive MDL and briefed and argued the disputed issues before the Special Discovery Master, all of which led to entry of the Fact Deposition Protocol (PTO 158). For deposition preparation, EPPs established a protocol and oversaw the creation of Plaintiffs' summary exhibits showing communications among Defendants' employees as reflected in phone records, *see* Fed. R. Evid. 1006, a resource-intensive but extremely important project. EPP Class Counsel trained all Plaintiffs' counsel on how to use these exhibits during depositions. These summary exhibits featured heavily in the dozens of depositions where inter-Defendant communications were examined. During bellwether discovery, EPP Class Counsel planned and organized calls among all Plaintiffs to ensure dozens of depositions of Defendants' current and former employes proceeded effectively, efficiently and according to plan. EPPs also drafted Plaintiffs' Rule 30(b)(6) notices for the bellwether Defendants, organized a team of Plaintiffs' counsel to take those depositions, oversaw planning and strategy for those depositions, and took the 30(b)(6) depositions of key Defendants Actavis, Mylan, Perrigo, Sandoz, Taro and Wockhardt.

Over the course of this MDL, some Defendants have declared bankruptcy. EPPs participated in the **bankruptcy proceedings** of Defendants Mallinckrodt, Teligent, Akorn and Par, and negotiated a discovery stipulation that preserved all MDL Plaintiffs' ability to obtain discovery, including depositions, from those bankrupt entities. EPPs implemented those agreements by obtaining limited relief from the bankruptcy stay. *See, e.g.*, MDL Docs. 1748, 1749, 1850, 2132, 2296, 2370 n.1, 2454, 2752. Further, EPPs took the lead in negotiating with the Mallinckrodt bankruptcy trustee, which led to agreements securing $8 million for MDL Plaintiffs.

Cooperating witnesses have played a central role in this MDL, providing direct evidence and detailed testimony regarding the formation and existence of the conspiracies. EPPs led negotiations and finalized the **cooperation agreements** with three cooperating witnesses on behalf of Private Plaintiffs. When Defendants issued document requests to all Private Plaintiffs regarding those negotiations, EPPs led Private Plaintiffs' response and produced the responsive, non-privileged documents relating to the cooperating witness agreements.

EPP Class Counsel's leadership in these negotiations was typical of how common issues were managed among Private Plaintiffs, with EPPs leading the way, including on practical aspects of the litigation. For example, EPPs organized the cost-sharing arrangements among all plaintiffs, and negotiated and finalized the deposition vendor contract and the contract for Private Plaintiffs' shared document review platform.

When briefing common issues, as well, EPPs typically have taken the lead. EPPs led negotiations with the so-called "Newly Added Defendants" regarding their efforts to file **additional motions to dismiss**, and led Private Plaintiffs' efforts, through filings and discussions with the Court, to develop a briefing schedule to minimize disruption to the MDL (*see* Order of 3/18/2022, MDL Doc. 2014). Likewise, EPPs led strategy, planning and drafting of **pleadings** to add Novartis AG and Sandoz AG as defendants, following a reorganization that threatened to leave defendant Sandoz Inc. unable to satisfy its MDL liabilities. EPPs filed the first such motion to amend (MDL Doc. 2787), which other Private Plaintiffs later incorporated by reference (*see, e.g.*, MDL Doc. 2809-1 at 3). EPPs also led objections to Novartis AG's efforts to prematurely insert itself into those proceedings. *See* MDL Docs. 2818 & 2954 at 25-30.

In addition to all of these important litigation activities, over these many years EPPs have taken a leading role on all **case management issues**. EPPs initiated and led discussions with

Defendants to develop the first case management order in the MDL and briefed and argued the disputes that ultimately were resolved by the Court in PTO 105 (Case Management and Discovery Schedule). Entry of that Order generated one of the most heated disputes in the MDL, culminating in Defendants' Petition for a Writ of Mandamus to the Third Circuit, which concerned the document production protocol of PTO 105. Along with the States, EPPs successfully opposed Defendants' Petition (and related motions to stay) in the Third Circuit and the Supreme Court of the United States. *See In re Actavis Holdco U.S., Inc.*, No. 19-3549, 2019 WL 8437021 (3d Cir. Dec. 6, 2019), *cert denied*, 141 S. Ct. 124 (2020). EPPs led the negotiations on all modifications and successor Case Management Orders (*see* PTOs 110, 123, 137, 138, 139, 141, 153, 165, 172), including the complicated negotiations over procedures for privilege logs, confidentiality designations and clawbacks (*see* PTO 137), and a dispute involving some Defendants who sought to blanket-designate every document as "outside counsel eyes only" (*see* PTO 141).

Later, EPPs led coordination among all plaintiffs to address the **selection of bellwether cases** (*see* PTO 105 ¶ 9(a)). Along with the States, EPPs led the effort to select appropriate bellwether cases to provide guidance for all MDL parties, and served in a principal role in all related litigation (*see, e.g.*, PTOs 132, 171). Once bellwethers were selected, EPPs led negotiations and litigation before the Special Master, as well as discussions before the Court, concerning entry of the first bellwether schedule, PTO 188. EPPs also managed all subsequent discussions to modify of that schedule. *See* PTOs 217 & 234.

All told, in the past nine years, EPP Class Counsel have spent hundreds of thousands of hours on this case, generating favorable results that will benefit all Plaintiffs, whether they remain in the EPP classes or not. EPP Class Counsel filed extensive, detailed complaints that not

only disclosed to EPP class members the existence of their claims, but also gave them the ability to argue that the EPP class actions tolled their statutes of limitations.[4] End-payers who exit the EPP class and file their own cases likely will be able to defeat motions to dismiss by relying on the favorable opinions that resulted from EPP Class Counsel's work. They will be able to obtain the Attorney General documents; documents and data from Defendants, and their current and former employees; and documents from phone carriers, simply by asking for them and relying on the favorable rulings obtained by EPP Class Counsel following hours upon hours of negotiation and litigation over many years. And they will be able to use those documents and records across all cases, without redactions for relevance and without objection from DOJ, because of EPPs' success in opposing Defendants' efforts to silo discovery and sanitize their documents, and in negotiating with DOJ. Opt-Out Plaintiffs litigating in federal court will be able to step into a case in which a Protective Order, an ESI Protocol and a Special Master Protocol already are in place, myriad discovery disputes already have been resolved and stand as precedents, and tens of millions of documents and reams of data already are in the discovery record. Opt-Out Plaintiffs who choose to litigate in state court will, at a minimum, benefit from the ability to use this Court's rulings as a strong source of persuasive authority.[5]

[4] For example, the Self-Insured DAPs relied heavily on the pendency of the EPP class actions in opposing Defendants' motions to dismiss on statute of limitations grounds. *See* 24-cv-1430, ECF 108. The same Plaintiffs also relied heavily on this Court's earlier opinions denying Defendants' motions to dismiss EPPs' complaints, to which EPP Class Counsel devoted extraordinary time and effort. *See, e.g.*, 24-cv-1430, ECF 99 at 6, 7, 9; ECF 100 at *passim*; ECF 103 at 8, 10, 11; ECF 104 at 9, 12; ECF 109, *passim* (citing *In re Generic Pharms. Pricing Antitrust Litig*, 338 F. Supp. 3d 404 (E.D. Pa. 2018) and/or *In re Generic Pharms. Pricing Antitrust Litig*., 394 F. Supp. 3d 509 (E.D. Pa. 2019)). Any future Opt-Out Plaintiff undoubtedly would do the same.

[5] For example, if the plaintiffs in the placeholder actions pending (but voluntarily stayed) in the Court of Common Pleas of Philadelphia County ever proceed with their actions, surely they will seek and receive the discovery record developed in this MDL, and surely they will rely on the dozens of favorable precedents generated by EPP Class Counsel's work. *See America's 1st*

EPP Class Counsel's efforts on the bellwether cases recently have culminated in yet additional work product that will be valuable to any class member who opts out of the litigation and/or settlements. EPPs' **summary judgment briefs** and **expert reports** collect the best evidence, make sense of an enormous record, and provide a roadmap for proving conspiracy, impact and damages. These materials' value will extend well beyond the bellwether cases. And, of course, any favorable rulings will benefit all end payers, whether they stay in the class or not. For example, other end-payer Plaintiffs now may rely on the Court's *Daubert* opinion in the EPP case, which excluded a number of Defendants' experts' opinions and established precedents that will govern future defense experts attempting to opine on issues like antitrust injury, causation and spread pricing, and who seek to offer opinions unsupported by empirical analysis. *See In re Generic Pharms. Pricing Antitrust Litig*., No. 16-CB-27242, 2024 WL 4980784 (E.D. Pa. Dec. 3, 2024), *on reconsideration in part*, No. 16-CB-27242, 2025 WL 478178 (E.D. Pa. Feb. 12, 2025).

Finally, there are the **settlements**. To date, EPP Class Counsel have negotiated three settlements totaling $333 million. Each EPP settlement is equal to or larger than the corresponding DPP settlement with the same defendant. It is exceedingly rare for end payer classes to achieve larger settlements than direct purchaser classes, especially in pharmaceutical antitrust cases. Typically, in antitrust class actions involving pharmaceutical products, EPPs receive a mere fraction of what DPPs obtain. *Compare, e.g., In re Suboxone (Buprenorphine*

Choice of S. Carolina, Inc. v. Actavis Elizabeth, LLC, Civ. A. No. 190702094 (Order granting motion to stay, Docket Entry 12-DEC-2019 03:43 PM), *Blue Cross and Blue Shield of N. Carolina v. Actavis Elizabeth, LLC*, Civ. A. No. 200500347 (Order granting motion to stay, Docket Entry 11-MAR-2021 09:38 PM), and *Amerihealth Caritas Health Plan v. Actavis Elizabeth, LLC*, Civ. A. No. 211000688 (Order granting motion to stay, Docket Entry 04-FEB-2022 11:55 AM). And, as noted above, there is no doubt that they will rely on the precedents set by the class settlements that EPP Class Counsel have achieved.

Hydrochloride & Naloxone) Antitrust Litig., No. 13-MD-2445, 2024 WL 815503, at *7 (E.D. Pa. Feb. 27, 2024) ($385 million DPP settlement) *with In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, No. 13-MD-2445, 2023 WL 8437034, at *2 (E.D. Pa. Dec. 4, 2023) ($30 million EPP settlement); *compare In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 309 (S.D.N.Y. 2020) ($750 million DPP settlement) *with In re Namenda Indirect Purchaser Antitrust Litig.*, No. 1:15-cv-06549-CM-RWL, ECF 975 at 1 (S.D.N.Y. Sept. 16, 2024) ($56.438 million EPP settlement); *compare In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 742 (E.D. Pa. 2013) ($150 million DPP settlement) *with In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 98 (E.D. Pa. 2013) ($35 million EPP settlement); *compare In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *3 (D.N.J. Nov. 9, 2005) ($75 million DPP settlement) *with In re Remeron End-Payor Antitrust Litig.*, No. CIV. 02-2007 FSH, 2005 WL 2230314, at *5 (D.N.J. Sept. 13, 2005) ($35 million EPP settlement); *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 83 (D. Mass. 2005) ($175 million DPP settlement; $75 million EPP settlement). EPP Class Counsel were able to achieve these results because they have led this case from the very beginning and all the way through, and they have made EPPs a real threat to Defendants.

Perhaps more than anything else, it is the settlements that will benefit Opt-Out Plaintiffs. In these cases, opt-outs typically calculate what they would have netted from the class settlement (*i.e.*, their *pro rata* share of the net settlement after deduction for attorneys' fees and costs) and try to get a little more from the settling defendant. In the absence of a set-aside order, because they are able to pay their individual counsel less than they would have paid class counsel (because their individual counsel did far less work), they often are able to achieve that goal. The requested set-aside order will ensure that EPP Class Counsel are properly compensated for their

efforts in creating the opportunity – and setting the benchmarks – for opt-out settlements. Opt-Out Plaintiffs should not be permitted to take advantage of the class-action mechanism to have their cake and eat it, too, *i.e.*, to get the benefits of being an absent class member without paying their fair share of the fees. The Court should enter a set-aside order to ensure that EPP Class Counsel will have a timely and orderly opportunity to seek fair compensation from any EPP class members who exit the case and, having received the benefits of EPP's work, settle outside the class.[6]

C. The Proposed Order

EPPs have modified the proposed set-aside order to address the concerns the Court and DAPs identified in 2019. *See* § II.A, *supra*. In summary, EPPs' revised Proposed Order, submitted herewith:

1. exempts the DAPs who have separately litigated their claims throughout the MDL (those DAPs are identified in § I, n.1, *supra*) ;
2. instructs Defendants to deposit 12.5% of any settlements with Opt-Out Plaintiffs into an escrow account;
3. permits EPP Class Counsel to later file an application with the Court for compensation from the escrow account; and

[6] As described above, EPP Class Counsel's efforts have benefited every plaintiff in this MDL, but EPP Class Counsel intend to seek compensation only from EPP class members (via fee petitions) and EPP opt-outs (via a set-aside order) because those are the entities that will benefit the most, and because the settlements make those benefits quantifiable (class members will be paid from the settlements funds, and opt-outs will use the settlements as benchmarks to achieve recoveries).

4. provides that any set-aside funds not awarded to EPP Class Counsel for common-benefit work will revert to the Opt-Out Plaintiff from whose settlement the funds were withheld.

EPPs respectfully submit that a set-aside protocol with these features is appropriate and, indeed, necessary to ensure fairness to counsel, class members, and Opt-Out Plaintiffs.

III. ARGUMENT

A. The Court Has Discretion to Issue a Set-Aside Order.

As the Third Circuit has recently noted in an antitrust price-fixing case, "[i]n multidistrict cases, it is standard practice for courts to compensate attorneys who work for the common benefit of all plaintiffs by setting aside a fixed percentage of settlement proceeds." *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 67 (3d Cir. 2023) (quotation marks and citation omitted). Indeed, "MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel." Ann. Manual Complex Lit. § 20.312 (4th ed.).[7] MDL courts authorize the creation of these common benefit funds "for the purpose of compensating and reimbursing attorneys for services performed and expenses incurred for the common benefit" of all plaintiffs. *In re: Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 07-MD-01871, 2014 WL 11395643, at *1 (E.D. Pa. May 12, 2014) ("*Avandia II*") (Rufe, J.), *aff'd*, 617 F. App'x 136 (3d Cir. 2015). Then, at a subsequent stage of the litigation, attorneys who worked for the common benefit of all

[7] *See also* Hon. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 374 (2014) ("Because the work that the [Plaintiffs' Steering Committee ('PSC')] performs inures to the common benefit of all plaintiffs . . . , MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the PSC and the members of any subcommittees who have done common benefit work.").

plaintiffs "move for disbursement of fees from the common benefit fund." William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 15:115 (6th ed. 2022).

To authorize the creation of common benefit funds, "[c]ourts have relied on two central powers." *Id.* § 15:114. ***First***, courts rely on their "'inherent authority,' bolstered by the specific statutory authority underlying an MDL." *Id.* (citing 28 U.S.C.A. § 1407). As the Third Circuit has explained, an MDL court "'has—and is expected to exercise—the ability to craft a plaintiffs' leadership organization to assist with case management.' Included in that ability 'is the power to fashion some way of compensating the attorneys who provide class-wide services.'" *Avandia*, 617 F. App'x at 141 (quoting *In re Diet Drugs*, 582 F.3d 524, 547 (3d Cir. 2009)); *accord In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003) ("*Linerboard I*") ("A necessary corollary to court appointment of lead and liaison counsel and appropriate management committees is the power to assure that these attorneys receive reasonable compensation for their work.").

Second, courts rely on "the common fund doctrine," which holds that "if a client secures relief for a group of claimants but must pay all of the costs herself, the other beneficiaries are unjustly enriched." *Newberg & Rubenstein* § 15:114. "The common fund doctrine rests upon the inherent equitable powers of the Federal Courts to 'prevent . . . inequity,' and to spread fees proportionately among those who have benefited from the suit." *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 07-MD-01871, 2012 WL 6923367, at *2 (E.D. Pa. Oct. 19, 2012) ("*Avandia I*") (Rufe, J.) (omission in original) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (U.S. 1980)).

Judges, scholars, and seasoned practitioners recognize the value of common benefit funds in appropriate cases. The American Law Institute "recommend[s] that the use of discovery

obtained by class counsel be compensated by 'order of the class-action court to sequester a portion of any recovery obtained by [an] exiting claimant to account for the benefit obtained from the class discovery.'" *Home Depot*, 59 F.4th at 68 (quoting *Principles of the Law of Aggregate Litigation* (A.L.I.) § 2.07, cmt. G). Likewise, *Guidelines and Best Practices for Large and Mass-Tort MDLs*—a resource developed by federal judges and experienced attorneys under the auspices of the Duke Law Judicial Studies Center—identifies the following as a best practice for MDL courts: "In imposing fee assessments, the transferee judge should . . . compensate counsel who made the recovery possible," which "may include imposing fees on attorneys representing individual clients who opt out, yet use MDL discovery materials or otherwise enjoy the fruits of common benefit counsels' efforts."[8]

The type of common benefit fund EPPs propose, which was originally developed in mass tort litigation, is familiar in pharmaceutical antitrust cases such as this one. *See, e.g.*, *In re Xyrem (Sodium Oxybate) Antitrust Litig.*, No. 20-MD-02966, 2024 WL 1683640, at *8 (N.D. Cal. Apr. 17, 2024) (ordering set aside); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2022 WL 18108387, at *4 (E.D. Va. Nov. 8, 2022) (same); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig*., No. 18-MD-2819, 2022 WL 19837725, at *1 (E.D.N.Y. Aug. 3, 2022) (same); *In re Aggrenox Antitrust Litig*., No. 3:14-MD-2516, 2018 WL 10705542, at *6 (D. Conn. July 19, 2018), *aff'd*, 812 F. App'x 26 (2d Cir. 2020) (same); *In re Lidoderm Antitrust Litig*., No. 14-MD-02521-WHO, 2017 WL 3478810, at *4 (N.D. Cal. Aug. 14, 2017) (same). That is because in these types of cases, "[a]s in the mass torts context, where lead plaintiffs' counsel are responsible for pushing the cases forward, marshalling the evidence and discovery, and at least

[8] BOLCH JUDICIAL INST., DUKE UNIVERSITY SCHOOL OF LAW, *Guidelines and Best Practices for Large and Mass-Tort MDLs* 80 (Best Practice 12H(i)) (2d ed. 2018), https://scholarship.law.duke.edu/bolch/5/.

initial rounds of motion practice, EPP Class Counsel . . . perform[s] the same tasks . . . for the benefit of *all* of the EPPs." *In re Lidoderm Antitrust Litig.*, 2017 WL 3478810, at *1 (emphasis in original). As explained by the court in *Zetia*, it is ill-founded to argue against a set-aside on grounds that "antitrust class actions, where lead counsel pursue claims on behalf of an entire class, do not present the same free-rider problems that exist in mass tort litigation":

> Tag-Along Plaintiffs' narrow assessment of the incentives in class action suits overlooks the primary justification for the common benefit fund doctrine – namely ensuring those parties who benefit from counsel's efforts contribute to the costs. While the free-rider problem may be felt most acutely by class counsel in mass tort cases with hundreds or thousands of individual plaintiffs, the risk of free-riding in class actions is not non-existent, especially in complex, vigorously contested antitrust cases such as this one. Without a set-aside order, tag-along plaintiffs could file their individual cases at the last possible minute, request and rely on the record developed by class counsel, and reap the savings in legal fees. That situation presents a classic problem of unjust enrichment, which the common benefit doctrine is meant to remedy.

Zetia, 2022 WL 18108387, at *4. The risk of such "free riding" justifies common benefit set-asides in antitrust class actions like this one. *See id.* at *4-5.

The Court's authority extends to parties, like some of the Opt-Out Plaintiffs here, that file cases in state court, or that settle without filing cases at all. *See, e.g.*, *Avandia II*, 617 F. App'x at 143-44 (upholding imposition of assessments on claimants represented by counsel in the MDL even though claimants themselves were not in the MDL); *In re Gen. Motors LLC Ignition Switch Litig.*, 477 F. Supp. 3d 170, 189, 193 (S.D.N.Y. 2020) (mandating assessments on settlements negotiated by law firms representing some clients in MDL and a larger number of non-MDL clients who had unfiled claims or cases pending in state courts; "The Court is not exercising jurisdiction over cases or parties not before it; it is exercising jurisdiction over the MDL.").

At bottom, "courts have the right and power to require those who benefit from a lawsuit to share in the costs of the litigation which benefitted them." *Zetia*, at *3 (quoting *Linerboard I*, 292 F. Supp. 2d at 654). "The desirability—indeed, the compelling need—to have pretrial

proceedings managed or at least coordinated by lead counsel or a steering or executive committee demands the existence of a source of compensation for their efforts on behalf of all." *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 130 (2d Cir. 2010) (Kaplan, J., concurring).

B. A Set-Aside Order Is Appropriate Here.

In light of the substantial work performed by EPP Class Counsel and the significant results already achieved, which will benefit every EPP class member whether it remains in the class or not, EPPs respectfully request that the Court establish a set-aside framework. Specifically, EPPs request that the Court order Defendants to set aside 12.5% of any settlements with Opt-Out Plaintiffs as potential compensation for EPP Class Counsel. The requested framework is appropriate for several reasons. ***First,*** the case is sufficiently advanced to warrant a set-aside order. ***Second,*** the proposed set-aside framework guards against windfall fee awards. ***Third,*** the framework is more administratively feasible than any available alternative. ***Fourth,*** entering a set-aside order at this juncture will allow end payers to make informed decisions about whether to exit any certified EPP classes, including the Clobetasol, Clomipramine, Apotex Settlement and Heritage Settlement classes.

i. The Case Is Significantly Advanced.

With bellwether discovery closed, class certification granted, summary judgment fully briefed, several settlements achieved, and trial preparation underway, this case is sufficiently advanced to warrant a set-aside order. *See Lidoderm*, 2017 WL 3478810, at *2 (noting that "courts have entered set aside orders prior to any recovery, as long as the litigation has been 'significantly advanced'"). Indeed, even Professor William B. Rubenstein, who argued against a set-aside order as an expert for DAPs in 2019, seemingly would agree that one would be appropriate now because "a class has been certified, discovery is completed or substantially completed, and a settlement has been achieved." Plaintiffs United Healthcare Services, Inc. and

Humana Inc.'s Opposition to End-Payer Plaintiffs' and Direct Purchaser Plaintiffs' Motion for Entry of Set-Aside Orders, MDL Doc. 1001 at 4 (citing Expert Declaration of Professor William B. Rubenstein, MDL Doc. 1002 ¶¶ 15-16). The favorable posture of this case for Plaintiffs at this advanced stage of the litigation is due, in large part, to the hundreds of thousands of hours and millions of dollars that EPP Class Counsel have invested in the case.

All end payers, including Opt-Out Plaintiffs, will benefit from these efforts. For example, EPPs helped develop and execute a case management plan "that has served as a road map for the entire MDL proceeding" and "provided order and structure to this complex litigation." *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 343, 349 (E.D. Pa. 2004) ("*Linerboard II*"). *See also Home Depot USA, Inc.*, 59 F.4th at *66 (recognizing that for opt-outs who choose to litigate their claims, "parties will be unlikely to relitigate issues on which the judge has already ruled without a compelling reason. New parties will figure out quickly which efforts to litigate[;] issues already decided by the judge at the urging of others will be futile."). EPPs have been at the forefront of every aspect of MDL case management, from taking a leading role in Court conferences to negotiating and litigating every major litigation protocol and schedule and developing and executing a plan for discovery.

The extensive fact and expert discovery EPPs have completed in the bellwether cases—and are completing in the non-bellwether cases—also benefits Opt-Out Plaintiffs, as "the mere availability of MDL discovery material influences a defendant's evaluation of non-MDL plaintiffs' cases, and thus confers a benefit." *Avandia II*, 2014 WL 11395643, at *2 n.4 (citing *Diet Drugs*, 582 F.3d at 548). *See Linerboard I*, 292 F. Supp. 2d at 658-59 (ordering set-aside where class counsel's work, including "prepar[ing] discovery requests," "obtain[ing] relevant documents," "participat[ing] in numerous meet-and-confer sessions" and "submitt[ing] the

disputes to the Court for resolution," "expedited the information-gathering process in this case and has benefitted all plaintiffs – including tag-along plaintiffs."); *see also* § II.B., *supra* (summarizing the myriad activities led by EPPs). Opt-Out Plaintiffs also will enjoy the benefits of the Court's favorable motion-to-dismiss rulings and *Daubert* opinions, as well as any favorable summary judgment and other pre-trial rulings on merits and evidentiary issues. In addition, the work of EPPs' experts provides a valuable roadmap to Opt-Out Plaintiffs on numerous crucial merits issues, and EPPs' cross-examination of Defendants' experts at the *Daubert* hearings will likewise produce valuable testimony on which Opt-Out Plaintiffs can rely.

Finally, the settlements EPPs have achieved will benefit all class members, including Opt-Out Plaintiffs. No one would seriously dispute that class settlements serve as benchmarks for opt-out settlements. Nor would anyone seriously dispute that the EPP settlements to date have been extraordinary, particularly in comparison to settlements achieved by other MDL plaintiffs and settlements achieved by end payers in other cases. *See* pp. 17-18, *supra*. The size of these and future settlements, and ultimately the size of any Opt-Out Plaintiff's settlements, will derive from the strength of the case EPPs have developed and will continue to develop. *See Diet Drugs*, 582 F.3d at 551 (where "Class Counsel substantially enhanced all claimants' chances for recovery by amassing meaningful discovery, drawing [the defendant] to the bargaining table, and negotiating with [the Defendant] a comprehensive settlement that evinced the company's acute interest in resolving the claims against it," the payment of fees to class counsel from opt-out recoveries is appropriate).

ii. The Proposed Framework Guards Against Windfall Fees.

In its 2019 Order, the Court explained that "the traditional mechanisms of class actions may appropriately compensate any class counsel," making a set-aside order premature at that

time. *See* 2019 Order at 2. EPP Class Counsel respectfully submit that the hundreds of thousands of additional hours and significant financial resources they have invested in this case in the intervening five-plus years reduce the likelihood that traditional class-action mechanisms, standing alone, will adequately compensate EPP Class Counsel for work benefiting Plaintiffs who exit this litigation. Indeed, one only has to look at EPP Class Counsel's request for fees from the Sandoz Settlement to see that there is little chance of adequate compensation. The requested one-third of the Sandoz settlement fund (net of administration costs, any reimbursed expenses, and service awards) accounts for less than 25% of EPP Class Counsel's estimated lodestar from inception through 2024. MDL No. 3327-1 at 2.

Moreover, the proposed set-aside protocol guards against overcompensating EPP Class Counsel. When ruling on any eventual request to award common benefit funds, the Court will know about, and be able to consider, any fees that EPP Class Counsel already "have received or may receive from other sources," namely fees awarded by this Court. *Linerboard I*, 292 F. Supp. 2d at 667; *accord Zetia*, 2022 WL 18108387, at *5 (explaining that lead counsel's "own recovery, if any, and the eventual compensation they receive will, of course, bear on the amount of compensation they eventually receive" from the common benefit fund). Because the Court must approve *both* EPP Class Counsel's requests for set-aside distributions *and* fee petitions arising from settlements or judgments that any certified EPP classes obtain, "there is no chance of a double recovery for EPP Class Counsel's time or expenses." *Lidoderm*, 2017 WL 3478810, at *1.

Finally, fees awarded to EPP Class Counsel from class settlements or judgments will "not resolve the equitable 'free rider' problem" posed by Opt-Out Plaintiffs who benefit from EPP Class Counsel's work but do not share the associated costs. *Id.* Because "the primary justification

for the common benefit doctrine" is to ensure that "parties who benefit from counsel's efforts contribute to the costs," any recovery EPP Class Counsel receive out of settlements and judgments "is not material to the question of *whether* they may seek compensation for the use of their work product in separate litigation filed by others." *Zetia*, 2022 WL 18108387, at *4-5. If the Court were to decline to establish a set-aside framework, then despite *all* class members—including Opt-Out Plaintiffs—benefiting from EPP Class Counsel's work, only the entities that remain in the class would pay for it. The Opt-Out Plaintiffs would take the benefits for free, walk away, and use Counsel's work and results to achieve their own settlements.

iii. The Proposed Order Is Administrable.

In its 2019 Order, the Court expressed concern about the administrative burdens a set-aside protocol might create. *See* 2019 Order at 2 ("Although EPPs and DPPs characterize the motion as a 'preliminary, prophylactic step,' the proposed orders would create a significant administrative process with one or more appointed administrators."). The framework proposed now is much simpler. The Proposed Order requires Defendants to deposit into escrow 12.5% of any settlement with an Opt-Out Plaintiff, and allows EPP Class Counsel to later apply to the Court for compensation out of the escrow. Because EPP Class Counsel have now filed a fee petition in connection with the EPP/Sandoz settlement, by the time any application for compensation is filed, the Court likely will have already considered Counsel's work, the results achieved, and the benefits conferred. Indeed, the Court likely will have already decided what percentage of the class's recovery to award to Counsel as fees, and the only additional decision to be made will be what percentage of Opt-Out Plaintiffs' recoveries to award. And after the Court issues a decision on one set-aside application, it seems likely that the parties will use the guidance from that decision to resolve future applications without bringing them to the Court.

This proposed framework is more administrable than any available alternatives. As a threshold matter, "[a]bsent an order of this Court requiring defendants to place funds in escrow," EPP Class Counsel may not even know "when or if opt-outs settle." *Lidoderm,* 2017 WL 3478810, at *2. The Court indicated in its 2019 Order that EPP Class Counsel could "monitor[] whether individual settlements of antitrust claims have been reached with the mostly publicly-traded corporate Defendants." 2019 Order at p. 2. However, several of the MDL Defendants are privately held. For example, Apotex is not publicly traded and, having settled with the EPP class, it is one of the Defendants most likely to settle with opt-outs. Without a set-aside order, EPP Class Counsel might never learn about settlements between Apotex and Opt-Out Plaintiffs, and certainly would not learn the amounts. And even the publicly traded Defendants – including large Defendants like Mylan and Teva – need only disclose those settlements that materially affect the companies' financial results[9]—a threshold their settlements with individual Opt-Out Plaintiffs may not reach.

Finally, even if EPP Class Counsel *are* aware of such settlements, "[w]ithout the entry of a set-aside order in advance of individual action settlements or judgments, individual actions could be dismissed after settlement or a judgment, requiring [EPP Class Counsel] to pursue separate compensation claims in any number of jurisdictions around the country." *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 267 (E.D.N.Y. 2006) (quoting *In re Worldcom, Inc. Sec. Litig.*, No. 02-cv-3288, 2004 WL 2549682, at *4 (S.D.N.Y. Nov. 10, 2004). An orderly process in this Court would be far superior to EPP Class Counsel chasing opt-outs around the

[9] Securities and Exchange Commission Regulation S-K Item 103(b) provides public companies with a safe harbor from the requirement to disclose material pending litigation if the claim for damages is less than 10% of the company's consolidated current assets. *See* 17 C.F.R. § 229.103(b)(2).

country.

Considering all of these factors, establishing a set-aside framework is necessary "to prevent unjust enrichment and ensure that attorneys remain incentivized to serve as class counsel in complex litigation, and that litigants benefiting from those efforts contribute proportionately." *Zetia*, 2022 WL 18108387, at *6. EPP Class Counsel respectfully submit that the most "orderly and efficient" solution "is to set up one mechanism in this Court—where the common benefit work has been performed—to resolve [EPP Class Counsel's] entitlement to compensation for common fund work performed." *Lidoderm*, 2017 WL 3478810, at *2.

iv. Now is the Appropriate Time to Enter a Set-Aside Order.

EPPs respectfully submit that now is the appropriate time to establish a set-aside framework. First, unlike the procedural posture of EPPs' cases at the time of the Court's 2019 Order, this case has progressed to the point where "the scope of the parties that would be affected by the [set aside] order[]" has been established." 2019 Order at 2. The opt-out deadline for the EPP/Sandoz settlement has passed, so there now exists a complete list of all entities that sought to opt out of that settlement. Not counting the entities that Counsel has excluded from this set-aside motion, there are 35 opt-outs.[10] Of these, 27 are represented by one of just four law firms. It seems likely that the opt-out list for future settlements, and probably for the Clobetasol and Clomipramine classes, will be similar. And therefore the universe of entities that would be subject to a Set-Aside Order is relatively well defined.

There is also more clarity with respect to the entities included as plaintiffs in the

[10] Included in the 35 are the nine "Self-Funded Direct Action Plaintiffs" that filed a complaint in the MDL in April 2024, *American Airlines et al. v. Actavis Holdco U.S., Inc. et al*, No. 24-cv-1430 (E.D. Pa.), ECF 1, five entities that EPP Class Counsel are told will be filing a new complaint soon, and five entities that EPP Class Counsel understand may petition the Court to re-enter the class.

placeholder writs filed in 2019, 2020 and 2021 in the Court of Common Pleas of Philadelphia County. *See* n.5, *supra*. As this Court will recall, those cases were voluntarily stayed by the parties, and with only one very recent exception,[11] they remain dormant. More to the point here, though, only 12 of the plaintiffs included in those writs opted out of the EPP/Sandoz settlement (and therefore would be subject to a Set-Aside Order), while the rest (more than 60) elected to remain in the settlement class (and therefore will not be subject to a Set-Aside Order unless they opt out of other classes later).

Thus, the universe of entities who will be affected by a set-aside order has become quite clear. For example, any one of the entities that opted out of the Sandoz settlement could potentially settle with Sandoz on its own. And with the long-time MDL participants excluded, not one of them has done the kind of substantial work that would lead them to a substantial settlement. If and when such settlements are achieved, they will be a direct result of years' worth of EPP Class Counsel's work, which culminated in the class settlements that set the stage for any opt-out recoveries.

Second, in contrast to the history of the case at the time of the Court's 2019 Order, it is clear that EPP Class Counsel have played a pivotal role in advancing this litigation on behalf of all Plaintiff groups, including any Opt-Out Plaintiffs.

[11] Aetna Inc., which was included in the 2020 placeholder writ, finally filed a complaint in the Court of Common Pleas in 2024, and after the court declined to allow the case to proceed, Aetna filed a complaint in Connecticut state court. *See Aetna Inc. v. Actavis Holdco US, Inc.*, Conn. Super. Ct., No. HHD-CV25-6196927-S, Doc. Entry No. 100.30 (complaint filed Dec. 31, 2024). Defendants filed their motions to dismiss on March 27, 2025. *Aetna Inc. v. Actavis Holdco US, Inc.*, Conn. Super. Ct., No. HHD-CV25-6196927-S, Doc. Entry Nos. 149.00-166.00. Aetna's response is due May 28, 2025. *Aetna Inc. v. Actavis Holdco US, Inc.*, Conn. Super. Ct., No. HHD-CV25-6196927-S, Doc. Entry Nos. 172.00, 172.86.

Third, the entities that would be affected by the set-aside order have received notice of the present motion. The notice plan to the EPP Clobetasol and Clomipramine classes commenced on May 6, 2025 and is underway. The Court-approved notice discloses that "Class Counsel intend to seek an Order from the Court that would require entities that opt out of the Classes, or any EPP settlement classes, and reach settlements with any defendant in the generic-drug-pricing litigation, to deposit 12.5% of the proceeds of any such settlements into escrow, so Class Counsel may apply to the Court for an award of attorneys' fees to compensate Class Counsel." *See* Proposed Long-Form Class Notice, ECF 3329-3 at Question 16. The notice further advises class members (1) that the present motion will be filed today; (2) that it will be posted on the end payer website, www.GenericDrugsEndPayerLawsuits.com, and (3) that class members may file a response to the motion by the deadline stated in the notice (14 days after filing, per the Court's usual briefing schedule). The class notice therefore adequately "informs class members of Class Counsel's intention to seek a set-aside order and its implications." *Xyrem*, 2024 WL 1683640, at *8 n.7; *see also Lidoderm*, 2017 WL 3478810, at *5 (directing class counsel "to make a copy of [the set-aside] Order available on the website established in connection with their efforts to notify the End-Payor Class of the Court's class certification order"). Affected class members will therefore have an opportunity to be heard on this motion.[12]

[12] Though the certified bellwether litigation classes constitute a subset of the more broadly defined Sandoz, Apotex and Heritage settlement classes, the same TPPs and TPP-related entities were sent direct notice for both the litigation classes and the settlement classes. *Compare* February 2025 Declaration of Elaine Pang, MDL No 3253-3 ¶ 23 (describing notice plan for Sandoz Settlement) *with* March 2025 Declaration of Eric J. Miller, MDL Doc. 3314-2 ¶ 12 (Notice Plan for Apotex and Heritage Settlement) *with* April 2025 Declaration of Eric J. Miller, MDL Doc. 3329-2 ¶12 (Notice Plan for litigation classes). They will also likely be the same group of entities who will be notified of any future settlements or judgments related to EPPs' claims in this MDL.

C. A 12.5% Set-Aside Is Appropriate in this Case.

"Courts have set a wide range of set-aside percentages in MDLs." *Xyrem*, 2024 WL 1683640, at *7. *See also In re: Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 07-MD-01871, 2014 WL 11395643, at *1 (E.D. Pa. May 12, 2014) ("*Avandia II*") (Rufe, J.), *aff'd*, 617 F. App'x 136 (3d Cir. 2015

EPP Class Counsel request a 12.5% set aside, which is within the range that courts in pharmaceutical antitrust class actions have ordered. *See, e.g., Restasis*, 2022 WL 19837725, at *1 (12.5% set aside); *Xyrem*, 2024 WL 1683640, at *8 (10% set aside); *Aggrenox*, 2018 WL 10705542, at *6 (10% set aside); *Lidoderm*, 2017 WL 3478810, at *3 (10% set aside). Courts in other complex litigations have ordered similar set-aside amounts. *See, e.g., In re Genetically Modified Rice Litig.*, 2010 WL 716190, at *6 (E.D. Mo. Feb. 24, 2010) (11% set-aside); *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 683 (E.D. La. 2006) (10% fees and 2% for costs); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL 1014, 1996 WL 900349, at *3-4 (E.D. Pa. June 17, 1996) (12% for fees and 5% for costs).

There are strong justifications for a 12.5% set aside here. As described above, EPP Class Counsel have spent hundreds of thousands of hours on this case, generating a vast discovery record and favorable judicial precedents that will benefit all Plaintiffs, including those who choose to opt out of the EPP classes. *See* § II.B., *supra*. And EPP Class Counsel's efforts have led to $333 million in settlements, which will benefit Opt-Out Plaintiffs by serving as benchmarks for their negotiations. Yet, as EPP Class Counsel's recent fee petition illustrates, EPP Class Counsel will only be compensated for a fraction of their work. *See* Fee Petition, MDL Doc. 3327-1 at 2 (fee request from Sandoz settlement fund translates to less than 25% of Counsel's lodestar).

"One way of grounding this number is to see it as a portion" of the contingent fee an Opt-Out Plaintiff will owe its own counsel. *Newberg & Rubenstein* § 15:116. For example, if the Opt-Out Plaintiff's attorney "has a 33% contingent fee but is relieved of significant pre-trial work by virtue of having a case transferred into an MDL, an assessment of around 8% effectively reflects a quarter of the contingent fee, commensurate with being relieved of a quarter of the underlying work." *Id.* Using that logic, EPP Class Counsel's 12.5% request here is a bargain, given that the Opt-Out Plaintiffs subject to the requested Order have done little or nothing to advance their cases, if they have even filed cases.

Importantly, when comparing this case to other pharmaceutical antitrust cases, it should be noted that the level of complexity in this case is unprecedented among pharmaceutical antitrust cases. The number of Defendants (nearly 40) and the number of drugs (more than 200) dwarf all of the above-cited cases, each of which involved a single drug and a handful of Defendants. Indeed, EPPs have 20 separate cases pending in this MDL. Managing and taking discovery in such a massive litigation has been daunting and, frankly, not something most (or perhaps any) opt-out could do on its own. If any case is deserving of a 12.5% set-aside, it is this one.

Finally, it is worth repeating that the present request is merely to have sufficient funds set aside; it is not a request for an award. That will come later, and if subsequent developments indicate that 12.5% is more than is necessary to compensate EPP Class Counsel for their work benefiting Opt-Out Plaintiffs, the Court can award less. But if the amount set aside is too low, EPP Class Counsel may never be fairly compensated for the time they devoted to work benefiting all end payers, including Opt-Out Plaintiffs. *See In re Syngenta AG MIR 162 Corn Litig.*, 2015 WL 2165341, at *5 (D. Kan. May 8, 2015) ("[I]t is better for the [set-aside]

percentages ultimately to prove too high than to prove too low, as it would be easier to refund excess funds than it would be to attempt to collect additional funds in the future.").

IV. CONCLUSION

For these reasons, EPP Class Counsel respectfully request that the Court enter the Proposed Order establishing a set-aside framework in this action.

Dated: May 22, 2025

Respectfully submitted,

/s/ Roberta D. Liebenberg

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Lead and Liaison Counsel for
End-Payer Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL NO. 2724 16-MD-2724
THIS DOCUMENT RELATES TO: ***All End-Payer Plaintiffs' Actions***	HON. CYNTHIA M. RUFE

[PROPOSED] ORDER GRANTING END-PAYER PLAINTIFFS' RENEWED MOTION FOR ENTRY OF SET-ASIDE ORDER

Upon consideration of End-Payer Plaintiffs' ("EPPs") Renewed Motion for Entry of Set-Aside Order, and any responses thereto, it is hereby ORDERED that the Motion is GRANTED. It is further ORDERED that:

1. This Order establishes a framework to allow EPP Class Counsel to seek attorneys' fees from entities that opt out of EPP litigation or settlement classes ("Opt-Out Plaintiffs")[1] and settle claims arising from the conduct at issue in this litigation, *i.e.*, Defendants' alleged conspiracies to allocate customers and markets, rig bids, or fix, raise, maintain and/or stabilize the prices of one or more of the generic drugs named in this litigation during the period 2009-2019.

2. For any such settlement obtained by an Opt-Out Plaintiff from an MDL Defendant, the settling Defendant shall, no later than five (5) days after entering into the settlement, (a) set aside and place into escrow 12.5% of the total monetary value of the

[1] For purposes of this Order, the following entities shall *not* be considered to be Opt-Out Plaintiffs: Cigna Corp., Health Care Services Corp., Humana Inc., Molina Healthcare, Inc., United HealthCare Services, Inc., and the local government entities included in the cases known as the "New York Counties" cases. Those entities shall not be subject to the terms of this Order.

settlement, and (b) notwithstanding any confidentiality provision in the settlement agreement, inform EPP Class Counsel of the settlement, its amount and the amount of the escrow deposit.

3. EPP Class Counsel shall maintain the confidentiality of the settlement, the parties thereto, and the amount thereof, disclosing that information only if, and as necessary to pursue, compensation as contemplated in this Order. If the settling parties use one of the confidentiality designations set forth in the Protective Order entered by the Court (PTO 195), EPP Class Counsel shall abide by the relevant provisions of that Order.

4. The funds shall remain in escrow unless and until the Court orders disbursement.

5. At a time of their choosing, EPP Class Counsel may apply to the Court for an award of attorneys' fees out of the set-aside funds for their common-benefit work. The common-benefit work eligible for compensation from an Opt-Out Plaintiff's settlement includes the work outlined in the Court's Pretrial Order No. 37, describing the duties and authority of Lead Counsel (MDL Doc. 507), and all related orders, upon a showing that such work was reasonable and benefited Opt-Out Plaintiffs, either while the Opt-Out Plaintiff was a member of an EPP putative class or after it opted out.

6. Any set-aside funds not awarded by the Court to EPP Class Counsel, or distributed pursuant to an agreement between EPP Class Counsel and the Opt-Out Plaintiff, shall be returned to the Opt-Out Plaintiff from whose settlement the funds were withheld.

7. This Order is without prejudice to EPP Class Counsel's rights to (a) petition the Court for attorneys' fees and expenses out of recoveries obtained on behalf of certified EPP litigation and settlement classes, and (2) seek set-aside orders against settlements and judgments in other courts if warranted by the facts.

It is so **ORDERED.**

BY THE COURT:

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CYNTHIA M. RUFE, J.